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Free Speech and Public Schools in a Post-Columbine World: Check Your Speech Rights at the Schoolhouse Metal Detector

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FREE SPEECH AND PUBLIC SCHOOLS IN A POST-COLUMBINE WORLD: CHECK YOUR SPEECH RIGHTS AT THE SCHOOLHOUSE METAL DETECTOR

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In December 1965, to protest the escalating hostilities in Vietnam and to express support for a truce over the holiday season, 13-year-old Mary Beth Tinker wore a black armband to her high school in Des Moines, Iowa.[1] In protecting the young girl's First Amendment[2] right of free speech in a public school, the United States Supreme Court famously proclaimed in 1969 that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[3]

Now fast-forward a full thirty years to 1999 and Allen High School just north of Dallas, Texas. Jennifer Boccia, then a 17-year-old honors student, wears a black armband like Mary Beth Tinker's to school—not to protest a war, however, but to mourn the students killed in April 1999 at Columbine High School near Littleton, Colorado[4] and to inveigh against newly implemented school security policies.[5] The school's response? A three-day suspension coupled with an order gagging her from speaking with members of the news media.[6] Boccia, ultimately, was forced to file a lawsuit against the school and its officials in order to protect her free speech rights and to have the three-day suspension expunged from her transcript.[7]

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1. Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 504 (1969).

2. The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses have been incorporated through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

3. *Tinker*, 393 U.S. at 506.

4. *See generally* James Brooke, *Terror in Littleton: The Overview*, N.Y. TIMES, Apr. 21, 1999, at A1 (describing "the deadliest school massacre in the nation's history" in which two gun-toting students wearing ski masks, Eric Harris and Dylan Klebold, fired semiautomatic weapons at fellow students and hurled explosives).

5 Mary Doclar, *Allen student won't face further discipline*, FORT WORTH STAR-TELEGRAM, Aug. 5, 1999, at Metro 3.

6. *Id.*

7. *Metro & Texas Digest*, FORT WORTH STAR-TELEGRAM, Aug. 31, 1999, at Metro 2.

Regrettably, the Texas school's action, which flies directly in the face of the 30-year-old precedent established in *Tinker v. Des Moines School District*,[8] is far from unique in a post-Columbine world. It is a world in which administrators, fraught with fears of similar violence at their own institutions, routinely sacrifice students' rights to free expression.[9] The armband dispute in Allen, Texas, in fact, is not even the only censorship atrocity after Columbine involving this most passive form of silent expression. In Louisiana in 1999, the Bossier Parish School District threatened Jennifer Roe, a Parkway High School student, with suspension for wearing a black armband in protest of her school's uniform policy.[10] It took a federal judge to rule in Roe's favor before the school board finally gave up its sartorial censorship campaign.[11]

This article is more than just the tale of three armband-wearing young women with a law firm-like name—Tinker, Boccia and Roe—and a proclivity for engaging in symbolic expression.[12] In particular, it is a story of censorship illustrated with a collection of cases from a growing laundry list of speech-repressive incidents involving public school students in the first twelve months since the tragic shootings at Columbine.[13] The article contends that, in many cases, the censorship occurring today is far from justified under established principles of First Amendment jurisprudence. The article suggests that constitutional rights currently are trampled on a routine basis in the nation's public schools, largely out of a combination of fear, ignorance and self-preservation on the part of administrators. The troubling lessons taught today's youth are that free speech means very little when fear takes over and that conformity to the norm—not daring to speak out, not voicing one's own opinion on issues, not engaging in creative writing or artwork—is the only way to avoid controversy, both inside and outside of school. Any speech, it

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8. 393 U.S. 503 (1969). In *Tinker*, the United States Supreme Court held that school officials may only restrict student speech lawfully if it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Id.* at 513.

9. For current background on the topic of school violence, including a number of essays from different scholars, see SCHOOL VIOLENCE (William G. Hinkle & Stuart Henry eds., 2000).

10. *School Board won't appeal protest order*, SATURDAY STATE-TIMES/MORNING ADVOCATE (Baton Rouge, La.), Jan. 8, 2000, at 4-B.

11. *Id.*

12. Conduct, such as wearing an armband, can be defined as expression -- symbolic speech -- under the First Amendment "if, first, there is the intent to convey a specific message, and second, there is a substantial likelihood that the message would be understood by those receiving it." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 868 (1997). The Supreme Court in *Tinker* cited with approval the district court's recognition "that the wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment." Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 505 (1969).

13. Columbine was rocked again in February 2000 when two of its students were killed in a shooting at a sandwich shop near the school. *See* Michael Janofsky, *In Sandwich Shop, 2 More Columbine Students are Killed*, N.Y. TIMES, Feb. 15, 2000, at A18 (describing this second round of violence affecting students at Columbine High School).

seems, that in any remote or tangential way evokes images of Columbine or violence is fair game for censorship.

The cases examined in this article make this clear. They run the gamut from the actual arrest of a seventh-grade student in Ponder, Texas for writing a violent Halloween horror story[14]—ironically, the student reportedly had received an "A" grade on the paper[15]—to the long-term suspension of a 17-year-old senior honors student in Leon, Kansas for writing a short poem, told from the perspective of an angry individual whose dog has been killed, that she posted on a door inside the school.[16] In another case examined here, a high school student in North Carolina was prosecuted and convicted of communicating threats for typing a simple-yet-polysemic[17] phrase—"the end is near"—on a school computer screen about two weeks after the shootings at Columbine High School.[18] He also was expelled from school for one year.[19] In January 2000, a high school student in Wisconsin wrote a note reading "Columbine 3:30 Tomorrow" that was discovered by a school employee.[20] He was charged with the felony offense of making a bomb threat.[21] Nothing in that phrase, however, mentions a bomb.

In some cases, school administrators even have cracked down after Columbine on the wearing of religious symbols on the chance that they might also be gang related and thereby lead to violence. In Harrison County, Mississippi, 15-year-old Ryan Green was prohibited from wearing the Star of David—the six-pointed star and symbol of Judaism that bedecks the Israeli flag—on school grounds.[22] The school contended it was a gang emblem.[23] It took the intervention of the American Civil

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14. *See* Josh Romonek, *Violent horror essay lands student in jail*, AUSTIN AM.-STATESMAN, Nov. 4, 1999, at B6 (describing the arrest of 13-year-old Christopher Beamon for writing a fictional story about shooting two classmates and a teacher). *See infra* notes 150-154 and accompanying text (describing the case in more detail).

15. *Halloween Tale Gets Boy an 'A,' and a Jail Stay*, WASH. POST, Nov. 3, 1999, at A20.

16. Boman v. Bluestem Unified Sch. Dist., No. 00-1034-WEB, 2000 WL 297167, at *1 (D. Kan. Jan. 28, 2000); *See Kansas Court to Hear ACLU Case of Honor Student Expelled for Displaying Artwork*, ACLU News (visited Feb. 14, 2000) <http://www.aclu.org/news/2000/n012800a.html>. *See infra* notes 162-176 and accompanying text (describing the case in more detail).

17. *See* GRAEME TURNER, BRITISH CULTURAL STUDIES: AN INTRODUCTION 36 (1990) (observing that "language is polysemic; that is, it can mean different things to different readers"). In this case, the phrase "the end is near" could mean many different things because it is ambiguous as to what or to whom "the end" refers.

18. Cory Reiss, *Computer Message at Hoggard*, MORNING STAR (Wilmington, N.C.) Sept. 30, 1999, at 1B.

19. *Id.*

20. *Threatening note forces Viroqua schools to close*, MILWAUKEE J. SENTINEL, Jan. 6, 2000, at 2.

21. *Some Seek Tough Law on School Threats*, WIS. ST. J., Feb. 22, 2000, at 5B.

22. Charles C. Haynes, *Safety is Important, But So Are Liberties*, DAYTON DAILY NEWS, Sept. 6, 1999, at 10A.

23. *Id.*

Liberties Union and the filing of a lawsuit by the boy's family before "the school board backed down and exempted religious symbols from its anti-gang policy."[24] Not only does this case raise troubling free speech issues under the First Amendment but also questions about the extent of free exercise of one's religion on school grounds.[25]

The wave of censorship even is affecting the student press. In a suburb of Cleveland, Ohio, a high school journalist was suspended after writing a satirical column in the wake of the Columbine shootings.[26] The student had suggested that students could relieve stress by assassinating the president and blowing up a house.[27] The school eventually ended up learning to appreciate the satire the hard way—by paying the student $16,500 to settle his lawsuit.[28]

But not all of the cases involve censorship of speech in the classroom or on school premises. Schools today are punishing students for their *off-campus* expression on the Internet if it somehow suggests or merely conjures up images Columbine-like terror.

For instance, a high school student in rural Rolla, Missouri was suspended for ten days and required to perform over forty hours of community service for an online comment he made five days after the Columbine shootings.[29] The student's offense? In response to a rather innocent-but-important question posed on a teens-only Internet discussion board—"Do you think such a tragedy could happen at your school?"—the student typed in a single word answer, "yes."[30] The suspension resulting from the use of this word apparently gives new meaning to the phrase "just say no."

In Washington state in February 2000, a federal judge issued a temporary restraining order preventing a high school from suspending a student who created a Web site that school officials claimed "contained threats against individual students and staff members."[31] Eighteen-year-

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24. *Id.*

25. The First Amendment provides in relevant part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. The Free Exercise Clause has been incorporated through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (holding that "the concept of liberty" in the Fourteenth Amendment "embraces the liberties guaranteed by the First Amendment").

26. Donna J. Robb, *Suspension taken off school record of student journalist*, PLAIN DEALER, Nov. 5, 1999, at 1B.

27. *Id.*

28. *Id.*

29. *Student sues school after being suspended for comment about Columbine on Internet discussion board*, Student Press Law Center Web Page (visited Feb. 8, 2000) <http://www.splc.org/newsflashes/102099missouri.html> [hereinafter *Student sues school*].

30. *Id.*

31. Lisa Pemberton-Butler, *Judge won't let district suspend student*, SEATTLE TIMES, Feb. 24, 2000, at B1.

old Nick Emmett, a star basketball player at Kentlake High School[32] and a standout student,[33] included mock obituaries of other students on his Web site.[34] The students, however, *requested* their own death notices and Emmett actually obtained permission from the students before running their photographs.[35] According to the Temporary Restraining Order entered by the district court judge, the site even contained a warning that it was for entertainment purposes only.[36]

In another recent Washington state case, a group of high school students who created a Web page off-campus, on their own time and with own their own computers, were suspended for a week and fined by the Lake Washington School Board after a prankster from another state "posted what sounded like a death threat" on their site.[37] Once again, it took the involvement of American Civil Liberties Union attorneys before the school district reversed itself several months later in February 2000.[38]

These cases, it must be stressed, are *not* exhaustive of the incidents of censorship occurring in schools today across the country. They merely are examples of the ones that either have been reported in the news media or have reached the judicial system. They are, in other words, only the tip of the iceberg. Is all of this censorship justified? Does it violate the First Amendment? What are the implications of this censorship on democracy? These are some of the important questions this article considers.

Part I articulates the primary legal standards and tests under which speech like that described above might justifiably be punished in public schools.[39] Part II then applies those rules to some of the cases mentioned above, illustrating that the speech in each incident merits protection under established principles of First Amendment jurisprudence.[40] Part III then suggests some of the undesirable social and political ramifications that may result from today's efforts to squelch student expression.[41] Finally, the article predicts that although today's censorship most likely will wane as time passes since the tragedy at Columbine, it nonetheless could very easily be revived by a similar incident unless like the one in Santee, California in March 2001 secondary school educators come to

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32. *See All-League boys teams*, SEATTLE TIMES, Feb. 26, 2000, at C5 (identifying Emmett as a first-team all-league player).

33. Emmett maintained a 3.95 grade-point average. Sandy Ringer, *Emmett wins court reprieve on suspension by Kentlake*, SEATTLE TIMES, Feb. 24, 2000, at D7.

34. *Judge Temporarily Halts Suspension of Student*, SEATTLE POST-INTELLIGENCER, Feb. 24, 2000, at B3.

35. *Id.*

36. Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp.2d 1088, 1089 (W.D. Wash. 2000).

37. Tan Vinh, *Students appeal fine over threat on Web*, SEATTLE TIMES, Jan. 10, 2000, at B1.

38. Tan Vinh, *Web-threat case dissolves*, SEATTLE TIMES, Feb. 4, 2000, at B1.

39. *See infra* notes 43-144 and accompanying text.

40. *See infra* notes 145-206 and accompanying text.

41. *See infra* notes 207-237 and accompanying text.

understand, embrace and fully value the importance of student speech rights.[42]

I. STIFLING STUDENT EXPRESSION: AVENUES OF ATTACK FOR ADMINISTRATORS

The current wave of censorship in public schools might be supported under several legal standards and principles that are applied by courts to determine whether a restriction on expression is constitutionally permissible. These different standards are described below.

A. *Supreme Court Standards for Regulating Student Expression*

In a trio of cases, the United States Supreme Court has suggested three circumstances in which student speech rights may be restricted without violating the First Amendment: 1) when the speech could substantially and materially disrupt the educational environment or interfere with the rights of other students; 2) when the speech is offensive or vulgar and occurs during a school-sponsored activity; and 3) when censorship is reasonably related to serving legitimate pedagogical concerns. Those three exceptions to the free speech rights of public school students are described below in more detail.

1. Substantial and Material Disruptions

The United States Supreme Court first recognized that public high school students possess a right to free expression in 1969 in *Tinker v. Des Moines School District*.[43] That right, however, is *not* absolute. In particular, the Court in *Tinker* held that "conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech."[44] Put more succinctly, the Court observed that speech may be abridged if it could reasonably lead school authorities "to forecast substantial disruption of or material interference with school activities."[45]

Applying this test to the donning of a two-inch wide band of black cloth on the sleeve to express disapproval of the Vietnam conflict, the Court ruled in favor of the students' rights to free speech in *Tinker*.[46] The speech, although it may have been unpopular among some students and

42. *See infra* notes 238-245 and accompanying text.

43. 393 U.S. 503, 506 (1969); *see* DAVID MOSHMAN, CHILDREN, EDUCATION AND THE FIRST AMENDMENT 11 (1989) (observing that *Tinker* marked "the first time" that the Supreme Court "declared a government action unconstitutional on the ground that it violated minors' rights to freedom of expression").

44. *Tinker*, 393 U.S. at 513.

45. *Id.* at 514.

46. *Id.*

administrators, was not disruptive and it did not interfere with the rights of other students.[47]

2. Offensive Language

The victory in *Tinker*, however, was far from ironclad and ultimately proved to be what one federal court in 1992 called "the high-water mark for public school students' First Amendment rights."[48] The "first major deviation" from the *Tinker* substantial-and-material disruption standard came in 1986.[49] In that year, the United States Supreme Court upheld the suspension of Matthew Fraser for making a campaign nominating speech laced with sexual innuendoes at a school assembly.[50] Writing for the majority of the Court, Chief Justice Warren Burger wrote that "the First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission."[51] The Supreme Court had distinguished Matthew Fraser's oration from that of Mary Beth Tinker's "nondisruptive, passive expression," calling the former's speech "lewd and obscene" and the latter's a "political position."[52] The Court concluded that "it was perfectly appropriate for the school to disassociate itself to make the point to pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education."[53]

With the decision in *Fraser*, the Court carved out a new exception to students' speech rights—the restriction of lewd and vulgar speech in assemblies and classrooms.[54] Lower courts picked up this confining precedent and ran with it. In one case, a federal district court upheld the suspension of a student for wearing a T-shirt that actually expressed an *anti*-drug use message—"Drugs Suck."[55] Kimberly Broussard purchased the shirt at a New Kids on the Block concert in March 1991 and wore it to her middle school about two weeks later.[56] School administrators ob-

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47. *Id.* at 509.

48. Broussard v. School Bd., 801 F. Supp. 1526, 1534 (E.D. Va. 1992).

49. S. Elizabeth Wilborn, *Teaching the Three Rs -- Repression, Rights, and Respect: A Primer of Student Speech Activities*, 37 B.C. L. REV. 119, 131 (1995). *Cf.* MICHAEL W. LA MORTE, SCHOOL LAW: CASES AND CONCEPTS 97 (4th ed. 1993) (observing that "Supreme Court decisions in the late 1980s have tended to limit what many observers heretofore thought the *Tinker* decision allowed").

50. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986). The speech described the candidate as "firm in his pants" and going to the "climax" for students. *Id.* at 687 (Brennan, J., concurring).

51. *Bethel Sch. Dist.* at 685.

52. *Id.* at 680.

53. *Id.* at 685-686.

54. "A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students." *Id.* at 685.

55. Broussard v. School Bd., 801 F. Supp. 1526, 1533 (E.D. Va. 1992).

56. *Broussard*, 801 F. Supp. at 1528.

jected to the use of intransitive verb "sucks" because it could be interpreted as offensive or sexual.[57] Broussard served a one-day suspension for refusing to change out of her shirt.[58] The young girl alleged the disciplinary action violated her right of free speech.[59]

After considering—hard as it may be to believe—scholarly expert testimony on the meaning of "sucks," a federal court in Virginia sided with the school, holding "that a reasonable middle school administrator could find that the word 'suck,' even as used on the shirt, may be interpreted to have a sexual connotation."[60] Citing the Supreme Court's decision against Matthew Fraser, the district court in *Broussard* observed that "[s]peech need not be sexual to be prohibited by school officials; speech that is merely lewd, indecent, or offensive is subject to limitation."[61] The district court found that school "officials had an interest in protecting their young students from exposure to vulgar and offensive language."[62] Thus, the court concluded that the school district did not violate Kimberly Broussard's First Amendment rights.[63]

In 1998, the Eighth Circuit Court of Appeals considered a case that also involved the use of offensive language by students.[64] In *Lacks v. Ferguson Reorganized School District*,[65] a high school teacher allowed her students to write and then have videotaped plays "including the repeated uses of the words 'fuck', 'shit', 'ass', 'bitch', and 'nigger'."[66] The school board eventually terminated the teacher as a result of this incident.[67] The appellate court found that "[a] flat prohibition on profanity in the classroom is reasonably related to the legitimate pedagogical concern of promoting generally acceptable social standards."[68] The Court concluded "that a school district does not violate the First Amendment when it disciplines a teacher for allowing students to use profanity repetitiously and egregiously in their written work."[69]

As recently as December 1999, a federal appellate court reiterated this sentiment in support of regulating offensive speech.[70] In *Henerey v.*

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57. *Id.* at 1533.
58. *See id.* at 1527.
59. *See id.* at 1528.
60. *Id.* at 1534.
61. Broussard v. School Bd., 801 F. Supp. 1526, 1536 (E.D. Va. 1992).
62. *Broussard*, 801 F. Supp. at 1537.
63. *See id.*
64. Lacks v. Ferguson Reorganized Sch. Dist. R-2, 147 F.3d 718 (8th Cir. 1998).
65. *Lacks*, 147 F.3d 718.
66. *Id.* at 719.
67. *See id.*
68. *Id.* at 724.
69. *Id.* at 719. *See generally* Merle H. Weiner, *Dirty Words in the Classroom: Teaching the Limits of the First Amendment*, 66 TENN. L. REV. 597, 631-634 (1999) (discussing the *Lacks* decision).
70. Henery v. City of St. Charles Sch. Dist., 200 F.3d 1128, 1131 (8th Cir. 1999).

City of St. Charles School District,[71] a case in which a student was punished for distributing condoms as part of his election campaign with the slogan "The Safe Choice;"[72] the Eighth Circuit Court of Appeals observed that a school must:

> retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with "the shared values of a civilized social order," or to associate the school with any position other than neutrality in matters of political controversy.[73]

The appellate court thus concluded that it was "well within the District's rights to disqualify Henerey for his actions in distributing material that ran counter to the District's pedagogical concern and its educational mission."[74] This language regarding pedagogical concerns, as the next section suggests, is derived from a United States Supreme Court decision affecting student newspapers. It reflects the third general exception to the principle of free speech for students in public schools.

3. Legitimate Pedagogical Concerns

In *Hazelwood School District v. Kuhlmeier*,[75] the United States Supreme Court held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[76] In articulating this "legitimate pedagogical concerns" standard, the Court upheld the decision of a high school principal to censor two articles—one on pregnancy among students, the other on divorce—in the high school newspaper.[77]

The *Hazelwood*[78] decision, according to legal scholar Don Pember, "has acted as a kind of imprimatur for high school officials to wield the censor's blue pencil with a heavy hand."[79] But the danger to student expression posed by the ruling extends far beyond censorship of newspapers. By its terms, the *Hazelwood*[80] standard is not limited to newspapers, but is applicable to other forms of "school-sponsored *expressive activities*."[81] Indeed, the 1999 federal appellate decision in *Henerey*[82] described

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71. *Henery*, 200 F.3d 1128.
72. *Id.* at 1131.
73. *Id.* at 1135 (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272 (1998)).
74. *Id.* at 1136.
75. 484 U.S. 260 (1988).
76. *Hazelwood Sch. Dist.*, 484 U.S. at 273.
77. *Id.* at 276.
78. 484 U.S. 260 (1988).
79. DON R. PEMBER, MASS MEDIA LAW 85 (2000 ed.).
80. 484 U.S. 260 (1988).
81. *Hazelwood*, 484 U.S. at 273 (emphasis added).
82. 200 F.3d 1128 (8th Cir. 1999).

above applied this test to a very different school-sponsored expressive activity—an election for junior class president.[83] The Eighth Circuit held in *Henerey*[84] that "the election was a school-sponsored activity that was part of the school's curriculum" and that the question therefore, under *Hazelwood*,[85] was whether the school district's "decision to disqualify Henerey from the election was reasonably related to legitimate pedagogical concerns."[86]

Taken together, the decisions in *Fraser*[87] and *Hazelwood*[88] "grant school officials considerable discretion in deciding all matters of student expression where the school's official imprimatur is present, whether the context of the activity is curricular in nature or where the school's sponsorship of the activity is obvious."[89] The two cases, as Professor William D. Valente observes, "limit the *Tinker* doctrine to expression that is not of pedagogical concern."[90]

4. Off-Campus, Internet-Posted Expression

Despite the erosion of protection for student speech in both *Fraser*[91] and *Hazelwood*,[92] a federal court in Missouri in 1998 found that neither of those cases controls in situations involving non-school sponsored speech created by students on their own time using their own computers.[93] The district court's decision in *Beussink v. Woodland R-IV School District*[94] is, as Professor Leora Harpaz writes in a recent law review article, "a victory for student Internet rights and a defeat for the school's disciplinary efforts."[95]

Brandon Beussink created, at home with his own computer, a web page that used vulgar language and was highly critical of the administration at his high school.[96] He was suspended from school for ten days immediately upon discovery by school officials of the offensive page.[97] In granting Beussink's motion for a preliminary injunction on the ground

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83. *See supra*, notes 70-74 and accompanying text.
84. 200 F.3d 1128 (8th Cir. 1999).
85. 484 U.S. 260 (1988).
86. *Henery*, 200 F.3d at 1133.
87. 478 U.S. 675 (1986).
88. 484 U.S. 260 (1988).
89. H.C. HUDGINS, JR. & RICHARD S. VACCA, LAW AND EDUCATION: CONTEMPORARY ISSUES AND COURT DECISIONS 395 (3d ed. 1991).
90. WILLIAM D. VALENTE, LAW IN THE SCHOOLS 278 (3d ed. 1994).
91. 478 U.S. 675 (1986).
92. 484 U.S. 260 (1988).
93. Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1990).
94. *Beussink*, 30 F. Supp. 1175.
95. Leora Harpaz, *Internet Speech and the First Amendment Rights of Public School Students*, 2000 B.Y.U. EDUC. & L. J. 123, 146 (2000).
96. *Beussink*, 30 F. Supp. 2d at 1177.
97. *See id.*

that the school's action violated his right to free speech; the district court held that "[d]isliking or being upset by the content of a student's speech is not an acceptable justification for limiting student speech under *Tinker*."[98] Applying the *Tinker*[99] standard of a reasonable fear of a material and substantial disruption of school affairs to the facts underlying the case, the court found that the principal's testimony "does not indicate that he disciplined Beussink based on a fear of disruption or interference with school discipline (reasonable or otherwise)."[100] Instead, the testimony suggested that the principal "disciplined Beussink because he was upset by the content of the homepage."[101]

The court later added an important piece of public policy dictum about the necessity of protecting the student's Web page:

> Indeed, it is provocative and challenging speech, like Beussink's, which is most in need of the protection of the First Amendment. Popular speech is not likely to provoke censure. It is unpopular speech that invites censure. It is unpopular speech which needs the protection of the First Amendment. The First Amendment was designed for this very purpose.[102]

The public interest, the court added, was not served by censorship or suspension, but instead by giving the students at Beussink's high school the "opportunity to see the protections of the United States Constitution and the Bill of Rights at work."[103] The case thus marks an important victory for the free speech of public school students, at least when that speech involves personal expression that is neither school sponsored nor created using school facilities, resources and time. It also suggests that the spirit and precedent of *Tinker*[104] are not dead just yet. This is an important point that should not be lost in the post-Columbine era of censorship.

5. Summary of Supreme Court Standards in Schools

The discussion above reveals that the United States Supreme Court has carved out three separate justifications for restricting student speech in public secondary schools—protecting the educational process and rights of other students against material and substantial disruptions, shielding minors from offensive and lewd speech, and training students based on legitimate pedagogical concerns. Beyond this trio of principles,

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98. *Id.* at 1180.
99. 393 U.S. 503 (1969).
100. *Beussink*, 30 F. Supp. 2d at 1180.
101. *Id.*
102. *Id.* at 1182.
103. *Id.*
104. 393 U.S. 503 (1969).

however, there are other ways in which student speech rights might be limited. Section B below discusses one of those avenues of censorship.

B. *The Incitement to Violence Standard*

As the Introduction suggested, many school administrators are concerned about Columbine-like violence at their own institutions and seem ready to censor any speech that advocates or vaguely suggests such violence. Advocacy of violence, however, generally is protected by the First Amendment "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[105]

This principle, articulated over thirty years ago by the United States Supreme Court in *Brandenburg v. Ohio*,[106] represents what constitutional law scholar Erwin Chemerinsky calls the Court's "most speech protective formulation of an incitement test."[107] The *Brandenburg*[108] test marks the modern evolution of the old clear-and-present danger standard[109] and it applies today to speech that "in some way *urges* people to action."[110]

The standard could be applied against students who intend, through their advocacy, to have others cause imminent violence to their schools. As Part II will later suggest, however, all of the post-Columbine cases mentioned at the start of this article involve expression that would remain protected under the *Brandenburg*[111] test.

C. *The True Threats Doctrine*

Some of the incidents of censorship after Columbine appear to be based on the idea that particular instances of speech constitute a threat of violence. The United States Supreme Court made clear in 1969 in *Watts v. United States*[112] that threats are *not* protected by the First Amendment.[113] The Court did not, however, articulate a clear test at that time for distinguishing a "true threat" from protected speech.[114] None-

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105. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

106. 395 U.S. 444 (1969).

107. *See* CHEMERINSKY, *supra* note 12, at 813.

108. 395 U.S. 444 (1969).

109. ROBERT D. RICHARDS, FREEDOM'S VOICE 62 (1998).

110. KATHLEEN SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW 54 (1999). *See* RALPH HOLSINGER AND JON PAUL DILTS, MEDIA LAW 82 (4th ed. 1997) (observing that, after *Brandenburg*, "[a]ny law that fails to make clear the distinction between urging people to take up arms against their government and merely talking about doing so violates the First Amendment.").

111. 395 U.S. 444 (1969).

112. 394 U.S. 705 (1969).

113. *Watts*, 394 U.S. at 707 (observing that "[w]hat is a threat must be distinguished from what is constitutionally protected speech.").

114. *See* United States v. Francis, 164 F.3d 120, 122 (2nd Cir. 1999) (observing that the Supreme Court in "Watts [sic] did not fashion a bright-line test for distinguishing a true threat from protected speech.").

theless, some rules about the true threats doctrine have emerged over time at the federal appellate court level.[115]

For instance, the Tenth Circuit Court of Appeals, in a 1999 decision involving alleged bomb threats conveyed by a member of an Oklahoma-based white supremacy organization, observed that true threats must be distinguished from "mere political argument, idle talk or jest."[116] Citing *Black's Law Dictionary*,[117] the appellate court defined a threat "as a declaration of intention, purpose, design, goal, or determination to inflict punishment, loss, or pain on another, or to injure his property by the commission of some unlawful act."[118] It then emphasized that "[t]he question is whether those who hear or read the threat reasonably consider that an actual threat has been made."[119]

In its 1999 decision in *United States v. Francis*,[120] the Second Circuit Court of Appeals held that a threat is not protected by the First Amendment if "on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution."[121] The appellate court observed that "once a statement meets this test, it is no longer protected speech because it is so intertwined with violent action that it has essentially become conduct rather than speech."[122]

The Ninth Circuit Court of Appeals actually considered, albeit in a 1996 and thus pre-Columbine case, a dispute involving an alleged threat by a public school student to shoot a guidance counselor.[123] In *Lovell v. Poway Unified School District*,[124] a tenth-grade student allegedly told her counselor that she would shoot her if the counselor did not make changes to the student's class schedule.[125] The student was suspended for the comment.[126]

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115. *See generally* Robert D. Richards & Clay Calvert, *The "True Threat" to Cyberspace: Shredding the First Amendment for Faceless Fears*, 7 COMMLAW CONSPECTUS 291, 293-295 (1999) (discussing the true threats doctrine).

116. United States v. Viefhaus, 168 F.3d 392, 395 (10th Cir. 1999) (citing U.S. v. Leaverton, 835 F.2d 254, 257 (10th Cir. 1987)).

117. BLACK'S LAW DICTIONARY 1489-90 (7th ed. 1999).

118. *Viefus*, 168 F.3d at 395.

119. *Id.* at 396.

120. 164 F.3d 120 (2nd Cir. 1999).

121. *Francis*, 164 F.3d at 123 (quoting United States v. Kelner, 534 F.2d 1020, 1027 (2nd Cir. 1976)).

122. *Id.*

123. Lovell v. Poway Unified School Dist., 90 F.3d 367, 368 (9th Cir. 1996).

124. *Lovell*, 90 F.3d at 368.

125. *Id.*

126. *Id.*

In considering whether this alleged comment—the student claimed she uttered a mere figure of speech under her breath[127]—constituted a true threat, the Ninth Circuit observed that the determination is based on an objective standard.[128] The test, the appellate court wrote, was "whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault."[129]

Of particular importance for the current wave of censorship based on Columbine-like fears is the Ninth Circuit's observation that "*in light of the violence prevalent in schools today, school officials are justified in taking very seriously student threats against faculty or other students.*"[130] The appellate court concluded that the alleged statement constituted a true threat of physical violence, remarking that "[t]his is particularly true when considered against the backdrop of increasing violence among school children today."[131] This language is especially favorable to administrators seeking to stifle student speech on the ground that it constitutes a true threat of violence. It acknowledges that violence *does* happen in schools and that, at least in some circumstances, speech must be abridged to prevent further violence from transpiring.

D. *Terroristic Threats Statutes*

Another avenue of attack against student speech—one based on fears that it may cause violence—is the use of state statutes that restrict terroristic threats. For instance, the California Education Code includes a specific section which provides that "a pupil may be suspended from school or recommended for expulsion if the superintendent or the principal of the school in which the pupil is enrolled determines that the pupil has made terroristic threats against school officials or school property, or both."[132] The statute defines a "terroristic threat" as:

> any statement, whether written or oral, by a person who willfully threatens to commit a crime which will result in death, great bodily injury to another person, or property damage in excess of one thousand dollars ($ 1000), with the specific intent that the statement is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person

127. *Id.*

128. *Id.* at 372.

129. Lovell v. Poway Unified School Dist., 90 F.3d 367, 372 (9th Cir. 1996) (quoting United States v. Orozco-Santillan, 903 F.2d 1262, 1265 (9th Cir. 1990)).

130. *Lovell*, 90 F.3d at 372 (emphasis added).

131. *Id.*

132. CAL. EDUC. CODE § 48900.7(a) (Deering 1999).

> reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, or for the protection of school district property, or the personal property of the person threatened or his or her immediate family.[133]

This definition is lengthy yet precise. In particular, it makes clear that abstract advocacy of violence is not a terroristic threat. Instead, the threat must be "unequivocal, unconditional, immediate and specific" before it can be punished.[134] The language also substantially mirrors that contained in the California Penal Code statute making the communication of threats a crime.[135]

California is not alone, however, in possessing a law that addresses threats in a school setting. The Texas Education Code provides for the removal from class and placement in an alternative education program for making a terroristic threat.[136] This Code section, in turn, refers to the Texas Penal Code section, which defines a terroristic threat as a threat "to commit any offense involving violence to any person or property with intent to . . . place any person in fear of imminent serious bodily injury."[137] The Texas Education Code also requires principals of both public and private primary and secondary schools to notify the local police department if they have "reasonable grounds to believe" the terroristic threat will be carried out on school property or at a school-sponsored activity or event off campus.[138]

In North Carolina, a person commits a misdemeanor offense for "[c]ommunicating threats" when he or she:

> willfully threatens to physically injure the person or that person's child, sibling, spouse, or dependent or willfully threatens to damage the property of another; (2) The threat is communicated to the other person, orally, in writing, or by any other means; (3) The threat is made in a manner and under circumstances which would cause a reasonable person to believe that the threat is likely to be carried out; and (4) The person threatened believes that the threat will be carried out.[139]

All four elements must be satisfied before a comment constitutes a threat.[140] There is, however, "no requirement that the threat be carried

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133. *Id.*

134. *Id.*

135. *See* CAL. PENAL CODE § 422 (West 1999).

136. *See* TEX. EDUC. CODE ANN. § 37.006(a)(2) (West 1999).

137. TEX. PENAL CODE ANN. § 22.07(a)(2) (West 1999).

138. TEX. EDUC. CODE ANN. § 37.015(a)(3) (West 1999).

139. N.C. GEN. STAT. § 14-277.1 (1999).

140. *See* State v. Elledge, 343 S.E.2d 549, 550 (N.C. Ct. App. 1986) ("The crime of communicating threats . . . involves more than making a threat to injure one's person or property and communicating it to the other person; it is also necessary, as the statute expressly provides, that the threat was made 'in a manner and under circumstances which would cause a reasonable person to

out."[141] Seventeen-year-old Joshua Mortimer was convicted of this crime for writing the simple phrase "the end is near" on a high school computer.[142] In some states, calls are being heard to strengthen existing statutes regarding threats. Legislators in Wisconsin want to make the penalties more severe for troublemakers who disrupt schools with death threats.[143] These lawmakers are seeking to enact legislation to treat death threats as felonies, like bomb threats are currently treated.[144]

E. *Summary*

This part described a number of different limitations on the speech rights of public primary and secondary school students. Clearly, the means exist to suppress student speech rights that do not run afoul of the First Amendment. Part II below suggests that students' constitutional rights to free expression have been violated since the shootings at Columbine. As will be made clear, it takes quite a bit of legal contortion and administrative courage to make some of the aforementioned instances of student speech fit within the categories of prohibited expression.

II. CENSORSHIP UNJUSTIFIED: WHY LEGAL STANDARDS DON'T SUPPORT TODAY'S REPRESSION

The tragedy at Columbine has produced a series of copycat threats of violence,[145] in addition to "heavy-handed responses from school administrators and authorities."[146] As Nadine Strossen, president of the American Civil Liberties Union recently observed, "'the schoolhouse these days is looking more like a jailhouse . . . .'"[147]

While events like bomb threats that undoubtedly deserve punishment have transpired since Columbine,[148] none of the cases described in the Introduction fit this description or can be described as true threats or incitements to violence. Likewise, none involved lewd, profane, or indecent speech that might be regulated under the precedent in *Bethel School*

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believe that the threat is likely to be carried out' and that '[t]he person threatened believes that the threat will be carried out.'").

141. State v. Roberson, 247 S.E.2d 8,9 (N.C. Ct.App. 1978).

142. *See* supra notes 17-18 and accompanying text.

143. *See Some Seek Tough Law on School Threats*, WIS. ST. J., Feb. 22, 2000, at 5B.

144. *Id.*

145. *See, e.g.*, Peter Maller, *Shawano school threat keeps students at home*, MILWAUKEE J. SENTINEL, Nov. 24, 1999, at 2. (indicating that Wisconsin schools have received "a series of threats" since the massacre at Columbine High School); Lisa Kernek et al., *Variety of incidents hit schools post-Columbine*, ST. J.-REG. (Springfield, Ill.), May 30, 1999, at 5 (describing a "wave of Columbine-prompted incidents" in Illinois).

146. Thaddeus Herrick, *Going too Far?*, HOUSTON CHRON., May 29, 1999, at A1.

147. Frank Santiago, *School violence jeopardizes*, DES MOINES REG., Oct. 10, 1999, at Metro Iowa 8.

148. *See Student Admits Bomb Threat, Is Expelled*, WIS. ST. J., May 12, 1999, at 3C.

District No. 403 v. Fraser.[149] This Part of the article will demonstrate, by applying the free speech standards and limitations explained in Part I to some of the cases described in the Introduction, that many instances of censorship today not only are misguided but are patently unlawful.

A. *True Threats or False Fears?*

Thirteen-year-old Christopher Beamon's teacher, Amanda Henry, assigned her class in Ponder, Texas "to write a horror story about being home alone and hearing noises."[150] Beamon wrote a story in which he "'acssedently [sic] shot Mrs. Henry,'" whom he "'thought . . . was a crook so I busted out with a 12 guage [sic] and Ismael busted out with a 9 mm and we step [sic] off the porch and this bloody body droped [sic] down in front of us and scared us half to death.'"[151] The story mentioned guns, drug paraphernalia, and shootings of two students as well as his teacher.[152] Beamon read his grammatically challenged story to the class to earn a few extra-credit points.[153]

Was the story poorly spelled? Certainly. Was it violent? Clearly. Was it worthy of the criminal complaint that his teacher filed with the local police?[154] Hardly. Was it a true threat of violence against his teacher? Far from it, at least under established First Amendment principles. Was it worth the five days that Beamon spent jailed in a juvenile facility?[155] No. The proper remedy may be a poor grade for inferior grammar and spelling but certainly not prolonged confinement in a detention center.

Under Texas law a person commits a terroristic threat "if he threatens to commit any offense involving violence to any person or property with intent to . . . place any person in fear of imminent serious bodily injury."[156] The key is intent. The intent, most likely, was to comply with the assignment. This was not a note threatening violence; instead it was a fictional story that, unfortunately and in pathetically poor taste, used the teacher's name as a victim of fictional violence.

The young boy's story did not constitute a true threat under First Amendment jurisprudence. Compare this situation to the case of *Lovell v. Poway Unified School District*,[157] described in Part I, in which the Ninth

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149. *See supra* notes 49-54 and accompanying text (discussing Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986)).

150. Romonek, *supra* note 14, at B6.

151. *Id.*

152. *See id.*

153. *See id.*

154. *See* Bud Kennedy, *Ponder school case disgraces Denton County*, FT. WORTH STAR-TELEGRAM, Nov. 4, 1999, at Metro 1.

155. *See id.*

156. TEX. PENAL CODE ANN. § 22.07(a)(2) (West 1999).

157. 90 F.3d 367 (9th Cir. 1996).

Circuit held that a tenth-grade student's verbal statement to her guidance counselor constituted a "true threat."[158] The student stated that she would shoot the counselor if she did not make changes to her class schedule.[159] The court observed that the test is "'whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault.'"[160] It is hard to believe that a reasonable person would find that a Halloween story by a seventh-grade student constitutes a serious expression of intent to harm or assault, regardless of its violent content. Indeed, the case of the Halloween story seems to be one involving unreasonable fears, illustrating the type of irrational censorship occurring across the country. The irony is that the paper received a 100 grade, plus extra credit points for the oral presentation.[161]

Like Beamon, Sarah Boman's ventures in creative writing landed her in trouble with school officials.[162] This Kansas high school senior was suspended for the remainder of the school year in January 2000 for displaying artwork on a school door that included text deemed "threatening" by school officials.[163] She wrote a short poem with the words arranged in a spiraling pattern, something an art professor called "repetitive" art.[164] In full, it reads:

> Please tell me who killed my Dog. I miss him very much -- He was my best friend. I do miss him terribly. Did you do it? Did you kill my dog? Do you know who did it? You know, don't you? I know you know who did it. You know who killed my dog. I'll kill you if you don't tell me who killed my dog. Tell me who did it. Tell me. Tell me. Tell me. Please tell me now. How could anyone kill a dog? My dog was the best. Man's best friend. Who could shoot their best friend? Who? Dammit, Who? Who killed my dog? Who killed him? Who killed my dog? I'll kill you all! You all killed my dog. You all hated him. Who? Who are you that you could kill my best friend? Who killed my dog?[165]

In a post-Columbine world, this poem constitutes a threat, according to some school administrators.[166] Under tenets of First Amendment juris-

158. *Supra* notes 123-131 and accompanying text.

159. *See supra* note 125 and accompanying text.

160. *See Lovell*, 90 F.3d at 372 (quoting *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990)).

161. *See* Brenda Rodriguez & Annette Reynolds, *Boy freed after story lands him in cell*, DALLAS MORNING NEWS, Nov. 3, 1999, at 1A.

162. *ACLU Vows Legal Action Over Honor Student's Expulsion for Displaying Artwork* (visited Feb. 16, 2000) <http://www.aclu.org/news/2000/n012000a.html> [hereinafter *ACLU Vows Legal Action*].

163. *Id.*

164. *Id.*

165. *Id.*

166. *See* Boman v. Bluestem Unified Sch. Dist., No. 00-1034-WEB, 2000 WL 297167, at *1 (D. Kan. Jan. 28, 2000).

prudence, however, it is anything but a threat. In order to constitute a true threat, the speech in question must be "so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution . . . ."[167]

No identifiable person is threatened in Sarah Boman's poem. The only violent parts are two statements: "I'll kill you if you don't tell me who killed my dog" and "I'll kill you all!"[168] In the context of a piece of posted artwork, these phrases are not true threats of imminent harm to any individual. When they are stripped of the artistic context they become only slightly menacing.

There is no intent to convey an actual threat. The intent was to create a piece of artwork, not to threaten actual violence.[169] The school could not point to any evidence suggesting that Boman's intent was "bad or willful."[170] Nonetheless, the school suspended Boman and conditioned her return on receiving a satisfactory report following a psychological examination.[171] One must wonder about the intellectual capabilities of educators who are unable to distinguish imaginative poetry from true threats and attacks.

Despite this egregious violation of Sarah Boman's right of free speech, it took legal action to resolve the matter. Boman's complaint alleged, among other things, that Bluestem High School's suspension of her violated her First Amendment right to freedom of speech.[172] On February 14, 2000, a federal judge found "no factual basis for believing that Ms. Boman had willfully violated any school rule, caused a substantial disruption in the operation of the school, or invaded the rights of other students."[173] He added that to require Boman to undergo a psychological examination as "a condition to reinstatement in the absence of any valid basis would impermissibly infringe on plaintiff's rights under the First Amendment."[174] The Judge ordered a permanent injunction, allowing Sarah Boman to return to school immediately.[175] Bill Hays, one of the attorneys representing Boman, called the judge's ruling a "'wise deci-

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167. United States v. Francis, 164 F.3d 120, 123 (2nd Cir. 1999) (quoting United States v. Kelner, 534 F.2d 1020, 1027 (2nd Cir. 1976)).

168. *ACLU Vows Legal Action*, supra note 162.

169. Roxana Hegeman, *Judge Rules Bluestem High School violated student's free speech rights*, ASSOCIATED PRESS NEWSWIRES, Feb. 14, 2000, *available in* LEXIS, News Library. Boman, a student assistant to the art teacher who was responsible for hanging artwork around the school, defended the work as conceptual art that she learned about in an art class. *See id.*

170. *Boman*, 2000 WL 297167, at *3.

171. *See id.* at *1-*2.

172. *See id.* at *3.

173. Boman v. Bluestem Unified Sch. Dist., No. 00-1034-WEB, 2000 WL 433083, at *1 (D. Kan. Feb. 14, 2000).

174. *Id.* at *2.

175. *See id.* at *3

sion, we are pleased he made the decision based on the First Amendment in Sarah Boman's case' . . . ."[176]

The creative works of Beamon and Boman, no matter how different they might have been in terms of creativity, have one very important thing in common. The First Amendment protects them both. But what about some of the other recent examples of student speech mentioned in the Introduction? Do those cases involve speech that legitimately could be construed to constitute a true threat of violence?

Nick Emmett created a Web page with mock obituaries of other students.[177] According to a district court judge, the fake obituaries were written in "tongue-in-cheek" fashion.[178] Visitors to the page could decide "who would be the subject of the next mock obituary."[179] In rejecting the school's contention that the page constituted a true threat of violence, the judge wrote that the school had "presented no evidence that the mock obituaries and voting on this web site were intended to threaten anyone, did actually threaten anyone, or manifested any violent tendencies whatsoever."[180] The Nick Emmett case demonstrates another instance of an unconstitutional punishment of speech in the post-Columbine era.

Emmett's case is particularly egregious because the speech took place off campus. The judge did not overlook this important fact, noting that Emmett's speech could not be restricted under the precedents of either *Fraser* or *Hazelwood*.[181] The speech in question did not occur during a school assembly, "was not in a school-sponsored newspaper," and "was not produced in connection with any class or school project."[182] The speech on the web site thus "was entirely outside of the school's supervision or control."[183]

Now consider again the case of Dustin Mitchell, the student who wrote "yes" on an Internet discussion board in response to whether a tragedy like Columbine "could happen" at his school.[184] He was suspended for ten days for the remark, which he made just five days after the shooting at Columbine.[185] Mitchell did not post the comment at

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176. Hegeman, *supra* note 169.

177. *See supra* notes 31-36 and accompanying text.

178. Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 1088, 1089 (N.D. Wash. Feb. 23, 2000).

179. *Id.*

180. *Id.* at 1090.

181. *See id.*; *see also supra* notes 49-90 and accompanying text (describing the cases of *Fraser* and *Hazelwood* and the rules articulated therein by the United States Supreme Court).

182. Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. at 1090.

183. *Id.*

184. *Student sues school*, *supra* note 29.

185. *See ACLU Defends Missouri Honors Student Suspended For Remark in Internet Chat Room*, (visited Feb. 29, 2000) <http://www.aclu.org/news/1999/n101499b.html> [hereinafter *ACLU Defends*].

school. He made it over a weekend, using the name of another student as an alias in the non-school sponsored chat room.[186]

The word "yes" posted off-campus on a computer in response to a question is not a true threat of violence under the tests articulated in Part I. Merely agreeing that violence could happen, without further specification, is not a true threat that it will happen. A true threat exists only if the speech is unequivocal, unconditional, immediate and specific as to the person threatened.[187] These elements are not present in this case.

Even more outrageous is that the speech, like the last two examples, occurred off campus, beyond the reach of the school's disciplinary authority. But, as in the case of poet Sarah Boman, Mitchell was forced to file a lawsuit to make this point and prove that his speech was not a threat.[188]

Now reconsider the case of Ryan Green, the Jewish student mentioned in the Introduction who wore the Star of David around his neck until school officials found it to be a threatening gang emblem.[189] The problem in this case is simple—it is hard, if not impossible, to make a rational argument that, without anything more to indicate unrest, *a sign of faith is a sign of violence*. Even if some anti-Semitic students found the symbol threatening to their own beliefs, Green was not intending to threaten them with his sartorial accessorizing.

Courts actually have addressed the constitutionality of regulating alleged gang symbols and clothing in public schools.[190] Indeed, an increasing number of schools are regulating student appearance today.[191] In *Stephenson v. Davenport Community School District*,[192] the Eighth Circuit Court of Appeals declared a school's regulation that restricted common religious symbols—in this case, a cross tattoo—as gang symbols to be unconstitutionally vague.[193] In a non-school setting, an appellate court in Illinois declared an anti-gang ordinance overbroad[194] and

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186. *See id.*

187. *See supra* note 120-121 and accompanying text (discussing *United States v. Fraser*, 164 F.3d 120, 123 (2d Cir. 1999)).

188. *See ACLU defends, supra* note 185.

189. *See supra* notes 22-25 and accompanying text.

190. *See generally* Christopher B. Gilbert, *We Are What We Wear: Revisiting Student Dress Codes*, 199 B.Y.U. EDUC. & L. J. 3, 10-15 (1999) (describing courts that have addressed school regulations that affect gang-related attire and symbols).

191. Alison G. Myhra, *No Shoes, No Shirt, No Education: Dress Codes and Freedom of Expression Behind the Postmodern Schoolhouse Gates*, 9 SETON HALL CONST. L.J. 337, 344-46 (1999).

192. 110 F.3d 1303 (8th Cir. 1997).

193. *Stephenson*, 110 F.3d at 1308-1311.

194. *See* City of Harvard v. Gaut, 660 N.E.2d 259, 262 (Ill. App. Ct. 1996). "A law is unconstitutionally overbroad if it regulates substantially more speech than the Constitution allows to be regulated and a person to whom the law constitutionally can be applied can argue that it would be unconstitutional as applied to others." CHEMERINSKY, *supra* note 12, at 764-65.

thus unconstitutional because it "prohibits nongang [sic] members from engaging in religious expression."[195] In that case, a 13-year-old boy was arrested for wearing a six-pointed star—the same symbol that Ryan Green wore to school. But unlike Green, this minor did *not* wear the Star of David as a symbol of Judaism but as a gang symbol.[196] Despite this fact, the appellate court held the law was unconstitutional because it was drafted so broadly that it would punish those individuals such as Green who wear the star as an expression of their religious beliefs.[197]

Finally, contemplate the conviction of Joshua Mortimer for communicating terroristic threats in North Carolina for typing in and then leaving the phrase "the end is near" displayed on a school computer.[198] Although the district attorney who prosecuted young Mortimer maintained that the statement could not be separated "from the surrounding circumstances"[199]—it was made two weeks after the incident at Columbine—this statement is not a direct threat of *anything* against *anyone*. The conviction was so stunning and ridiculous that the Freedom Forum, a pro-First Amendment organization,[200] dubbed the incident its First Amendment "Outrage of the Week."[201] Calling the action in North Carolina "legalistic hysteria," the organization admonished that "school administrators should have taken the little incident as an opportunity not for overreaction and prosecution but for education and perspective. Tell the student jokester why others might be frightened (justifiably or not) by what he wrote. And tell others just to calm down."[202]

In summary, school administrators are turning harmless statements—stories, poems, mock obituaries, jewelry, and otherwise innocuous messages—into true threats. In doing so, they have harmed not only the students involved these cases, but also the free speech rights of others who might want to engage in similar benign expression.

B. *Substantial Disruptions or Petty Problems?*

Even if student speech does not constitute a true threat of violence, it still may be punished under the *Tinker* precedent if administrators can reasonably foresee that it may lead to a substantial and material disrup-

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195. *Gaut*, 660 N.E.2d at 263.

196. *Id.* at 260.

197. " Because the ordinance prohibits symbolic speech, freedom of religion and freedom of expression, we conclude that ordinance is 'substantially overbroad.'" *Id.* at 263.

198. *See supra* notes 17-21 and 139-142 and accompanying text (describing the Mortimer case and the law applied by the court).

199. Reiss, *supra* note 18, at 1B.

200. For more background on the organization, see the Web site for the Freedom Forum at <http://www.freedomforum.org> (visited Mar. 3, 2000).

201. *First Amendment outrage of the week: Turning kids' stray comments into lawsuits*, FREEDOM FORUM ONLINE (visited Oct. 5, 1999) <http://www.freedomforum.org/first/outrage.asp>.

202. *Id.*

tion of school affairs.[203] None of the instances depicted in this article fall within this standard.

Reading a story in class that contains violence or posting on a door a piece of artwork/poetry that refers to killing does not substantially disrupt school affairs. It is highly unlikely, to say the least, that after hearing Christopher Beamon read his story that his classmates would actually pick up guns and shoot their teacher. Students may laugh or chuckle, but such levity surely is *not* a substantial or material disruption. Likewise, the readers of Sarah Boman's work were not likely to become so riled up by its text that they disrupted the school day. As Judge Brown wrote in his order granting a permanent injunction against Boman's school that entitled her to be reinstated as a student, "the evidence simply fails to show that the poster caused or was likely to cause a substantial disruption in the operation of the school."[204] The speech of Beamon and Boman thus cannot be punished justifiably under the *Tinker* precedent.

Wearing the Star of David on a chain around one's neck hardly can be said, without any other evidence or extenuating circumstances, to create a reasonably foreseeable risk of substantial disruption in the classroom. Likewise, mock obituaries, written in tongue-in-check fashion and posted on a non-school sponsored Web site, are not likely to cause a material interference with academic affairs or the rights of other students. The only foreseeable disruption might occur if someone, during a class that used computers, logged onto the Web site of Nick Emmett and burst out laughing. But that is a far cry from the type of disruption necessary to stifle speech that was envisioned by the United States Supreme Court in *Tinker*.

A computer displayed message reading "the end is near" is not likely to cause a substantial disruption. The only time it conceivably would do so would be if a teacher or administrator panicked and overreacted, letting *unreasonable* fears—not rational reasons—take over and guide the reaction to this statement. Deleting the message from the computer screen removes whatever potential for disruption may exist.

C. *Incitements or Amusements?*

As discussed in Part I, speech that is directed to inciting or producing imminent lawless action *and* is likely to incite or produce such action is not protected by the First Amendment. None of the incidents discussed in this article constitute an incitement of others to engage in violence at school.

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203. *See supra* notes 43-45 and accompanying text (describing the *Tinker* case).

204. Boman v. Bluestem Unified School Dist No.5., No. 00-1034-WEB, 2000 WL 433083, at *2 (D. Kan. Feb. 14, 2000).

The prose of Christopher Beamon and the poetry of Sarah Boman did not advocate *others* to engage in violence. They were not *directing* or *intending* others to commit violence. What's more, there is no way these fictional works could be construed as likely to produce violence.

In fact, none of the examples of abridged speech mentioned in this article—mock obituaries posted on a Web page, the phrase "the end is near" displayed on a school computer screen, the word "yes" typed in on an Internet chat room in response to a question about whether violence could happen at one's school, the Star of David hung around one's neck on a chain—can in any way be said to *encourage* or *urge* others to commit violence. None of this speech, in other words, constitutes an incitement to imminent violence.

In some cases, harmless amusements—mock obituaries, for instance—have been transformed by school administrators into insolent incitements. But an intent to amuse is not an intent to incite.

The United States Supreme Court once observed that it is "often true that one man's vulgarity is another's lyric."[205] Perhaps this aphorism explains the problem today in public schools—the subjectivity of meaning across generations and cultures. Students who might create a message without any intent of it being interpreted as an incitement to violence may find their messages misconstrued. Consider the case in which a note reading "Columbine 3:30 Tomorrow" resulted in a felony charge.[206] Is this an incitement to violence? Is it a true threat of violence? Or is it one student's amusement or prank? Rather than rush to judgment that it is an incitement or threat, administrators should step back and consider the third possibility.

III. THE POLITICS OF COLUMBINE: CENSORSHIP AND THE LESSONS IT TEACHES

"Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears."[207] Those words, written by Justice Louis Brandeis over seventy years in a concurring opinion in the criminal syndicalism case of *Whitney v. California*,[208] seem to be forgotten today by public school administrators. Irrational fears of violence, in many cases, have justified suppression of some very harmless, albeit sometimes sophomoric, statements.

Ironically, all of this is occurring at a time when FBI data reveal that arrests nationwide of juveniles for serious and violent crimes are drop-

205. Cohen v. California, 403 U.S. 15, 25 (1971).
206. *See supra* and accompanying text.
207. Whitney v. California, 274 U.S. 357, 376 (1927).
208. *Whitney*, 274 U.S. at 376.

ping dramatically.[209] What's more, a study published in August 1999 in the *Journal of the American Medical Association* indicates that between 1991 and 1997, high school students in the United States "became less likely to carry weapons, to engage in physical fights, and to be injured in physical fights."[210] These reports, it seems, have been all but ignored by public school administrators.

Part I made it clear that it is permissible to punish speech that constitutes a substantial and material interference with the academic affairs of a public school, as well as speech that constitutes either a true threat of violence or an incitement to violence.[211] The problem, however, is that in the process of punishing this type of unlawful speech, school administrators also are sweeping up otherwise protected expression. The metaphorical net, in brief, has been cast too far and too wide, and it now is trapping innocent speech.

The efforts of school administrators thus remind one of the dictum of the United States Supreme Court's 1957 decision in *Butler v. Michigan*.[212] Justice Felix Frankfurter, in declaring a Michigan law that restricted speech unconstitutional because it "reduce[d] the adult population of Michigan to reading only what is fit for children,"[213] wrote that the affect of the law "*is to burn the house to roast the pig*."[214] School administrators today are, essentially, burning the free speech rights of many students in order to nab the tiny fraction that legitimately should be punished for conveying true threats of violence or disrupting academic affairs.

What price will be paid down the road for this wave of censorship? Will it produce a generation of young adults who do not appreciate the value of free speech because, sadly, their own public school principals and administrators did not appreciate its value? At a time when many young people already are disenchanted with politics and opting out of voting because they feel they have no voice in the process,[215] will the

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209. *Arrests for Juvenile Crimes Drop Across Nation*, S.F. CHRON., Oct. 18, 1999, at A2; *See also* Matthew Katz, *Crime in schools decreasing*, CINCINNATI ENQUIRER, Oct. 20, 1999, at A08 (describing the results of the second annual report on school safety released by the Clinton Administration).

210. Nancy D. Brener et al., *Recent Trends in Violence-Related Behaviors Among High School Students in the United States*, 282 JAMA 440, 442 (1999).

211. *Supra* notes 43-144and accompanying text.

212. 352 U.S. 380 (1957).

213. Butler, 352 U.S. at 383.

214. *Id.* (emphasis added).

215. *See* Mary Beth Marklein, *Taking the pulse of America's freshmen*, USA TODAY, Jan. 25, 1999, at 6D (reporting the findings of the annual "American Freshman" survey conducted by UCLA's Higher Education Research Institute and finding that "today, new freshmen in growing numbers are significantly less interested in talking about politics and in keeping up with political issues"). During the 1996 presidential election, people ages 18 to 24 voted in record low numbers. *Young Americans Shunned Polls This Year*, ARIZ. REPUB., Nov. 24, 1996, at A25. An estimated 29

ongoing war on student speech rights further weaken and, perhaps, silence their voice in the political process?

The implicit message conveyed by administrators today is that democracy is not too far removed from totalitarianism when fear of violence takes hold with a vengeance. It is important, then, to keep in mind the majority's words in *Tinker*—that "[in] our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students."[216] As the attorney for one teenager charged after Columbine with making plans to blow up his own high school—charges that were later dismissed on First Amendment grounds—aptly put it, students are being prosecuted "in response to the politics of Columbine."[217] The danger is that the politics of Columbine amount to the politics of authoritarianism and totalitarianism.

School administrators, it must be recognized, are responsible for protecting other students from harm in the classroom and on the schoolyard. Their efforts to quash true threats, to punish speech that substantially disrupts the academic affairs, and to act on behalf of legitimate pedagogical concerns are all worthy objectives.[218] The problem arises, however, when fear and panic take over—as they have post-Columbine—and when the desire to preserve the educational environment means sacrificing speech that does not fall into one of these categories recognized by the United State Supreme Court.

A. *Missing the Teachable Moment*

In the Sennett Middle School in Madison, Wisconsin a 13-year-old boy was expelled in June 1999 after he allegedly wrote "People are going to die like in Colorado" on a locker in the boys' locker room.[219] Is this the proper response to an alleged threat that did *not* lead to the evacuation of the school?[220] True, the student may never do this again, but was a moment—a teachable moment—lost in which school officials might have explained to the student why the speech was inappropriate *and* informed him of both the rights and responsibilities that come with the First Amendment? If the writing merely was a hoax, then the lesson to be taught is the age-old one articulated by Justice Oliver Wendell Holmes,

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to 30 percent of people that age cast a ballot in the 1996 presidential election, compared with 42 percent in the 1972 race between Richard Nixon and George McGovern. *Id.*

216. Tinker v. Des Moines School Dist., 393 U.S. 503, 511 (1969).

217. Linda Spice, *Judge dismisses teen bomb threat case*, MILWAUKEE J. SENTINEL, July 3, 1999, at 1.

218. *See supra* notes 43-144 and accompanying text (explaining how these justifications for restricting speech are recognized by the United States Supreme Court).

219. Chris Murphy, *13-Year-Old Expelled for Threat*, CAPITAL TIMES (Madison, Wis.), June 22, 1999, at Local/State 3A.

220. According the school's attorney, the threat did not force the evacuation of the school. *Id.*

Jr.—that one cannot falsely shout fire in a theatre.[221] *Must, however, this First Amendment lesson be learned at the cost of expulsion?*

It is important to note here that suspending students for their allegedly harmful speech may not cure the problems perceived by school administrators. Indeed, research demonstrates that "suspensions fail to modify negative behavior."[222] If this is correct, then the rash of suspensions and expulsions for students exercising their rights of free speech is further unjustified, even if one sides with administrators that the speech should be punished.

In choosing to suspend and expel students rather than teach them about the rights and responsibilities of freedom of expression, school administrators also are ignoring one of the age-old remedies or antidotes to speech that we find harmful. Justice Brandeis, concurring in *Whitney v. California*,[223] articulated the premise of what today is known as the doctrine of counter speech.[224] When it came to expression that was perceived by some to be dangerous, threatening or harmful, Brandeis famously wrote that "if there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[225]

At the heart of the counter-speech doctrine is the principle, as Harvard's Laurence Tribe writes, that "whenever 'more speech' could eliminate a feared injury, more speech is the constitutionally-mandated remedy."[226] Rather than censor allegedly harmful speech and thereby risk violating the First Amendment protection of expression or file a lawsuit that threatens to punish speech perceived as harmful, the preferred remedy is to add more speech to the metaphorical marketplace of ideas.[227]

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221. *See* Schenck v. United States, 249 U.S. 47, 52 (1919) (observing that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic").

222. BEVERLEY H. JOHNS ET AL., REDUCTION OF SCHOOL VIOLENCE: ALTERNATIVES TO SUSPENSION at 1.5 (2nd ed. 1997).

223. Whitney v. California, 274 U.S. 357, 377 (1927).

224. *Id. See generally* Michael Kent Curtis, *"Free Speech" and Its Discontents: The Rebellion Against General Propositions and the Danger of Discretion*, 31 WAKE FOREST L. REV. 419, 433 (1996) (observing that Justice Brandeis "insisted that in spite of dangers, the only appropriate remedy for much evil speech is counter-speech and reason").

225. *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring).

226. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 834 (2d ed. 1988).

227. "The 'marketplace of ideas' is perhaps the most powerful metaphor in the free speech tradition." RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 6 (1992). The marketplace metaphor "consistently dominates the Supreme Court's discussions of freedom of speech." C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 7 (1989). The metaphor is used frequently today, more than 75 years after it first became a part of First Amendment jurisprudence with Supreme Court Justice Oliver Wendell Holmes, Jr.'s often-quoted admonition that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). *See* W. Wat Hopkins, *The*

School administrators are ignoring the counter speech doctrine. Surely programs could be initiated to teach students about the right of free speech, as well as its limitations. Because very few of the instances of allegedly harmful speech in public schools today actually rise to the level of true threats of imminent danger, there *is* time, as Justice Brandeis would put it, "to avert the evil by the processes of education."[228] It is, of course, more than slightly ironic that educators are missing the chance to educate.

B. *Silly Leaflets Redux?*

Justice Holmes, of course, is known for more than his aphorism about falsely shouting fire in a theatre described in the previous section.[229] In his dissenting opinion in *Abrams v. United States*,[230] Holmes argued that speech cannot be restricted unless there is a "present danger of immediate evil or an intent to bring it about."[231] In that case, he alleged that the offending speech did not approach a clear and present danger of violence but was, instead, nothing more than a "silly leaflet."[232]

Might it be that today, in our public schools, we are turning what amount to silly leaflets into something more than they really are? Are we turning harmless rhetoric and otherwise indirect messages of violence into true threats? As we crack down on speech, then, might we not actually be tempting more minors to engage pranks? Forbidden fruit often is attractive, and if talking about Columbine or schoolhouse violence is forbidden by adults and schools administrators—people in positions of authority—it may actually make it *more* attractive for some teenagers to engage in such speech.[233] The mass hysteria of censorship, in other words, could have the unintended and unfortunate consequence of actually promoting the very speech that it attempts to deter.

Perhaps there is no better analogy so far to the silly leaflet referred to by Justice Holmes in *Abrams* than the case of the 13-year-old Wisconsin boy who allegedly scribbled bomb threats on Popsicle sticks.[234] Regardless of the message scribbled, it is extremely hard to take seriously a threat on a Popsicle stick. Nonetheless, the middle school student was

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Supreme Court Defines the Marketplace of Ideas, 73 JOURNALISM & MASS COMM. Q. 40 (1996) (providing a recent review of the Court's use of the marketplace metaphor).

228. *Whitney*, 274 U.S. at 377 (1927) (Brandeis, J., concurring).

229. *Supra* note 221 and accompanying text.

230. 250 U.S. 616 (1919).

231. *Abrams*, 250 U.S. at 628 (Holmes, J., dissenting).

232. *Id.*

233. There is support for the forbidden fruit theory in areas such as movie ratings, with research showing that putting a more adult rating on a movie may make it more attractive to children. Heather Fleming, *TV's 'forbidden fruit'*, BROADCASTING & CABLE, Mar. 31, 1997, at 14.

234. Herrick, *supra* note 146, at A1.

taken to, and held in, a secure detention facility.[235] The offending sticks, in fact, actually caused school officials to dismiss classes after they were discovered.[236]

School officials must protect the safety and lives of their students. No reasonable person would question that. But, perhaps, reasonable people would question whether writing on a Popsicle stick is a true threat. If it was nothing more than a prank to get students out of classes, it worked, probably much to the delight of many students who got to go home early. Recall from Part I that true threats must be distinguished from "mere political argument, idle talk or *jest*."[237] Unfortunately, what is said in jest and what simply is silly are being swept up together with true threats in post-Columbine hysteria.

CONCLUSION: ZERO TOLERANCE, ZERO COMMON SENSE

Some of the school administrators who zealously censor student speech today do so under the justification of a "zero tolerance" policy for expression that suggests violence.[238] The problem is that in the course of enforcing these policies, *zero tolerance often amounts to zero common sense*. School administrators strive to teach critical thinking skills to their young charges are not applying those same skills in their own reasoning process when it comes to punishing student expression.

As time continues to pass since the events at Columbine in April 1999, common sense may begin to reemerge. However, when other disturbing events such as the shooting in February 2000 of one first-grader by another in a Michigan elementary school arise,[239] irrational fears will not be suppressed for long. Speech will find itself the target of suppression once again, and federal courts will find themselves dealing with merit less instances of censorship anew.

School administrators rightfully are concerned about stopping violence on their campuses. But they also must be concerned about protecting the rights—speech rights included—of the vast majority of nonviolent students under their supervision. Unless school officials appreci-

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235. *Third-grader among latest students caught for threats*, Associated Press, May 21, 1999, *available in* LEXIS-NEXIS Academic Universe, News Library.

236. *Senior faces charges just before graduation*, Associated Press, May 23, 1999, *available in* LEXIS-NEXIS Academic Universe, News Library.

237. United States v. Viefhaus, 168 F.3d 392, 395 (10th Cir. 1999) (emphasis added).

238. *See* Carlos Illescas, *School threats now taken very seriously*, DENVER POST, Nov. 22, 1999, at B-01 (observing that "since the April 20 shootings at Columbine High School, educators nationwide are armed with new zero-tolerance policies and are taking threats more seriously than ever before.").

239. *See* Stephen Braun & Julie Cart, *6-Year-Old Mich. Girl Is Killed By Classmate Shooting*, L.A. TIMES, Mar. 1, 2000, at A1 (describing the shooting in a first-grade classroom in Beull Elementary School in a working-class community sixty miles north of Detroit).

ate the values of free speech—as a tool for self-realization,[240] a means of discovering the truth,[241] and a fundamental part of democracy[242]—and learn to appreciate the harm done to the First Amendment and society when they unnecessarily punish expression, censorship will continue.

Students who are taught that freedom of speech means very little and can be sacrificed cavalierly will be less appreciative of its values and, perhaps, less likely to assert themselves through expression in our already participation-poor democracy. The value taught now, regrettably, is that government authorities—read, public school principals and superintendents—can shut off the flow of speech at their whim. Unless a student is willing to hire an attorney or can convince the American Civil Liberties Union to take up her cause, there will be little to prevent individual instances of school-based censorship from going unchecked.

The crackdown on student speech after Columbine is paralleled by a similar move to restrict violent media fare that allegedly promotes violence in schools.[243] It is this overall climate of censorship, including the media blame game now in vogue in Washington against the Hollywood entertainment industry,[244] that allows speech restrictive measures to thrive in public schools.

In summary, the cases analyzed in this article should provide educators with a primer on what *not* to do when it comes to student expression. Unfortunately, when speech in public schools is in dispute, we rapidly are becoming the diametric *opposite* of what University of Michigan President and constitutional scholar Lee C. Bollinger once hoped for—we are becoming a very intolerant society, not a tolerant one.[245]

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240. *See* BAKER, *supra* note 227, at 69 (writing that speech must be protected, in part, because it promotes "the speaker's self-fulfillment").

241. "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market." Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., dissenting).

242. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948) (describing the purpose of free speech in a democracy).

243. *See* Nick Anderson, *House GOP Seeks Media Violence Curbs Legislation*, L.A. TIMES, June 8, 1999, at A6 (describing government proposals to restrict the sale of media products such as books and films that contain violence).

244. Howard Kurtz, media reporter for The Washington Post, observed that within hours of the shootings, commentators and politicians cast blame on violent movies, violent computer games, and the Internet. Howard Kurtz, *Let the Blame Begin*, WASH. POST, Apr. 26, 199, at C01.

245. *See* LEE C. BOLLINGER, THE TOLERANT SOCIETY (1986) (developing a tolerance theory of free expression).